

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO,

Complainant,

and

RYKER WADA, Director,
Department of Human Resources,
State of Hawai'i; DAVID Y. IGE,
Governor, State of Hawai'i; and
NOLAN ESPINDA, Director,
Department of Public Safety, State
of Hawai'i,

Respondents.

CASE NOS. CE-01-720a
CE-10-720b

ORDER NO. 3494

ORDER REQUIRING PARTIES TO
SUBMIT STATEMENT OF
CLARIFICATION OF REMAINING
ISSUES AND PROVIDE
INFORMATION REGARDING
STATUS OF THIS CASE

ORDER REQUIRING PARTIES TO SUBMIT
STATEMENT OF CLARIFICATION OF REMAINING ISSUES
AND PROVIDE INFORMATION REGARDING STATUS OF THIS CASE

On July 31, 2009, Complainant UNITED PUBLIC WORKERS, AFSCME, Local 646 (UPW or Complainant) filed with the Hawai'i Labor Relations Board (Board) a prohibited practice complaint (Complaint) against former Director of the Department of Human Resources Development, State of Hawai'i (DHRD) Marie Laderta (Laderta),ⁱ alleging violations of Hawai'i Revised Statutes (HRS) § 89-13(a)((5), (7), and (8) arising out of a July 22, 2009 request to negotiate and for information on impending layoffs of 123 bargaining unit 1 (Unit 1) and 93 bargaining unit 10 (Unit 10) employees.

On August 17, 2009, Laderta filed a Motion to Dismiss and/or for Summary Judgment, asserting that, by letters dated July 30, 2009 and August 7, 2009, the State responded to the UPW's

information request; and that the decision to layoff employees is not negotiable pursuant to HRS § 89-9(d) (Respondents' MTD/MSJ).

On August 24, 2009, UPW filed: a Motion to Amend Complaint; a Motion for Interlocutory Relief (UPW Motion for Interlocutory Relief); and UPW's Opposition to Respondent Marie Laderta's Motion to Dismiss and/or for Summary Judgment.

On August 27, 2009, the Board issued Order No. 2634 which granted the Motion to Amend Complaint and set deadlines to supplement previously filed Motions and responses.

On August 27, 2009, UPW filed a First Amended Prohibited Practice Complaint (Amended Complaint), which added Linda Lingle, Governor, State of Hawai'i (Lingle or Governor),ⁱⁱ and Clayton A. Frank (Frank), Director, Department of Public Safety, State of Hawai'i (PSD),ⁱⁱⁱ as Respondents (collectively referred to with Laderta as Respondents). The Amended Complaint further added allegations that Lingle's threat of mass layoffs and the shutdown of programs interfered, restrained, and coerced employees in the exercise of statutory and constitutional rights (by and through the UPW); that on July 29, 2009, the UPW submitted a request to negotiate over the decision and implementation of the decision to close Kulani Correctional Facility (Kulani) and submitted a supplemental request for information to Laderta and Frank; that the reduction in force and layoff procedures, time deadlines, criteria, and arbitrary requirements as set forth by Respondents in their August 4, 2009 notices to affected employees were not subject to prior notice, consultation, or negotiation with the UPW; that on or after August 4, 2009, the UPW requested extensions of time deadlines and further information; that Laderta and Frank provided partial responses to the information request; and that Respondents wilfully interfered with, restrained, and coerced employees in the exercise of rights, guaranteed under HRS chapter 89, in violation of HRS § 89-13(a)(1); discriminated regarding terms and conditions of employer to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs, and discharges in violation of HRS § 89-13(a)(3); refused to bargain collectively in good faith over furloughs as an alternative to layoffs and unilaterally implemented procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of HRS § 89-13(a)(5); refused to comply with HRS §§ 89-3 and 89-9(a), (c), and (d), in violation of HRS § 89-13(a)(7); and violated the terms of the Unit 1 and 10 collective bargaining agreements (CBAs), including §§ 1, 3, 11, 12, 13, 14, 38, 66, and 68 in violation of HRS § 89-13(a)(8).

The parties filed supplemental memoranda and responses to the Respondents' MTD/MSJ and the UPW Motion for Interlocutory Relief.

On September 10, 2009, the Board heard oral arguments on Respondents' MTD/MSJ and UPW's Motion for Interlocutory Relief.

On October 22, 2009, the Board issued Order No. 2656 Findings of Fact, Conclusions of Law, and Order Granting in Part Respondents' Motion to Dismiss and/or for Summary Judgment and denying Complainant's Motion for Interlocutory Relief, and Notice of Hearing (Order No. 2656). In Order No. 2656, the Board provided the following Summary of its rulings:

SUMMARY

25. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(1), (3), and (7) (subsection § 89-13(a)(7) with respect to alleged violation of § 89-3), the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

26. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(5) and (7) (subsection § 89-13(a)(7) with respect to alleged violation of §§ 89-3 and 89-9(a) and (d)), the Board concludes that Respondents are entitled to summary judgment on this issue. The Board therefore denies injunctive relief based upon this issue as Complainant has failed to establish likelihood of success on the merits of this issue.

27. With respect to the issue of the procedures and criteria for layoffs, such procedures and criteria are permissive Respondents are entitled to summary judgment on this issue, and the Board denies Complainant's Motion for Interlocutory Relief with respect to this issue.

28. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(7) with respect to alleged violation of HRS § 89-9(c), the Board denies Respondents' Motion to Dismiss and/or for Summary Judgment with respect to this issue, and denies Complainant's Motion for Interlocutory Relief with respect to this issue.

29. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(8), to the extent the alleged violations of the collective bargaining agreements involved alleged failure to negotiate or bargain, discrimination, retaliation, adherence to the layoff procedures, or interference, restraint, or coercion, the Board grants summary judgment in favor of Respondents and denies Complainant's Motion for Interlocutory Relief on these issues, for all the reasons discussed above. To the extent the alleged violations of the collective bargaining agreements involve other issues (such as employee discipline or leaves of absence), the Board denies

Respondents' Motion to Dismiss and/or for Summary Judgment with respect to these issues, and denies Complainant's Motion for Interlocutory Relief with respect to these issues.

30. With respect to the issue of collective bargaining agreement provisions continuing beyond the agreement's expiration date, the Board concludes that the provisions of the agreements did not automatically renew, and any continuation of provisions of the Unit 1 and Unit 10 agreements beyond the agreements' expiration dates are controlled by the principles in *Katz*, cited to with approval by the circuit court in HGEA v. Linda Lingle, Civil No. 09-1- 1375-06(KKS).

31. With respect to the issue of Respondents' alleged failure to provide information, the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

Based on a review of the foregoing Summary set forth in Order No. 2656, Order No. 2656 resolved all the issues in this case except for the allegations of prohibited practice pursuant to HRS§ 89-13(a)(7) regarding alleged violation of HRS § 89-9(c) (the employer's duty to consult with the union) and allegations of prohibited practice pursuant to HRS § 89-13(a)(8) to the extent that the alleged violations of the CBAs involve issues other than the alleged failure to negotiate or bargain, discrimination, retaliation, adhere to the layoff procedures, or interference, restraint, or coercion (such as employee discipline or leaves of absence). Order No. 2656 further noticed a hearing on the remaining issues on November 2, 2009.

On October 28, 2009, the Board issued Errata for Order No. 2656, which corrected inadvertent omissions from the caption.

The Board records indicate that there were hearings on the merits (HOM) held in this case on November 2, 3, 12, 18, and 19, 2009 and status conferences held on December 8, 16, and 29, 2009, January 12, 2010, and February 3, 2010.

During the November HOM, Complainant called Remy T. Bolante; Linda K. Ishii; Wesley Hayashi, Richard Ah Yo; Edward K. Kinzie; Roslyn Murakane; Douglas Cobile, Kolakiaokalani Kamaka, June Rabago, Respondent Laderta, UPW State Director Dayton Nakanelua (Nakanelua), and Respondent Frank. The Board and the parties introduced numerous exhibits that were received in evidence.

At the November 18, 2009 HOM, then Board Chair James B. Nicholson (Chair Nicholson) stated that the Board would reconvene to receive the testimony of Nakanelua regarding two possible meetings with the Governor or a stipulation regarding those meetings and discussions as to the Kulani closure and the layoffs and to issue any order that the Board deems necessary.

At the November 19, 2009 HOM, Chair Nicholson orally issued the following ruling (November 19, 2009 Oral Ruling):

CHAIRMAN NICHOLSON: Based on the evidence and testimony presented at hearing, the Board finds that there is a duty to bargain over the effects of the closure of the Kulani Facility.

Employer is ordered to maintain all wages and benefits of Kulani Unit 1 and Unit 10 employees in the positions they held at Kulani through and including December 31, 2009.

In order to avoid any disruption, Unit 1 or 10 employees who have relocated to other islands will be allowed to remain there during the bargaining process.

During the period from November 20th through and including December 31st, 2009, PSD will be given the responsibility of assigning Kulani Unit 1 and 10 employees to other correctional facilities on the Big Island.

The parties will commence bargaining over the effects of the Kulani closure forthwith.

The Board will conduct status conferences on December 8 and December 16 at 8:30 a.m. in the Board's hearing room regarding the status of the bargaining process.

The Board will be issuing a written decision on this matter as well as other issues in this case.

UPW's counsel requested clarification regarding whether the oral order included HCCC employees who had been given notices that they were going to be relocated or terminated because of their displacement by Kulani employees. The Board Chair responded that "...those types of things will be handled during the effects bargaining, and if those issues are raised and it's a concern, I think that the Union and the Employer would handle that situation."

At the subsequent December 8 and 16, 2009 status conferences, the parties reported on the progress of negotiations. At the December 16, 2009 status conference, the parties reported working on a proposed resolution regarding the issue of effects bargaining over the Kulani closure, which was waiting the Governor's approval.

At the February 3, 2010 status conference, the parties signed the proposed resolution.

On February 4, 2010, Respondents filed Respondents' Report to the Board on the Status of the Effects [Bargaining] Over the Closure of the Kulani Correctional Facility and attached Exhibit "A", the Proposed Resolution HLRB Decision No. 720 Kulani Closure, which was signed by Nakanelua and Respondent Frank and dated February 3, 2009 (Proposed Resolution). The Proposed Resolution provided, among other things:

4. UPW and PSD will enter into a written agreement, which will include RIF/Layoff compensation adjustment for those who are placed into permanent appointments similar to what is done with other UPW employees in the same Bargaining Unit who have been subject to layoffs and placements.

5. It is understood, warranted and agreed between the parties that the claims raised in this matter are fully disputed and this resolution is in no manner an admission of any liability, nor will this resolution be represented by anyone to be an admission of liability of any kind.

6. This agreement resolves the effects bargaining over the closing of Kulani Correctional Facility and otherwise does not amend or revise any existing language in the collective bargaining agreement and resolution shall have no effect, impact or precedent value as to any other claim, action, proceeding or matter of any kind.

7. For the State, this proposed resolution is subject to approval by the Governor or designee.

On September 9, 2010, Respondents filed Respondents' Supplement to the Record, which was a copy of the Hawai'i Supreme Court's (Court) decision in Hawai'i Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Lingle, No. 29972, 124 Hawai'i 197, 239 P.3d 1 (2010).

On February 3, 2014, the Board held a status conference in this case.

Following that status conference, there was no further action in this case for five years until the Board noticed a status conference on February 4, 2019.

At the February 4, 2019 status conference, UPW's counsel noted, among other things, that after the Court's February 28, 2014 decision (United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Abercrombie, 133 Hawai'i 188 (2014)), that there was an order for mediation of the civil matter, the parties entered into a memorandum of agreement for arbitration and mediation (MOA), that this case is under mediation with Walter Ikeda, and that these proceedings were stayed. However, UPW's counsel was uncertain whether the MOA was still in effect (because of the employer's withdrawal from the MOA) and whether the stay was in effect. UPW's counsel

requested mediation from the Board and that the status conference be continued for two months to enable him to review the case. Respondents' counsel was of the opinion that, because this case is in mediation, the mediation would stop if the instant case began to move. Respondents' counsel had no objection to the additional time for consideration.

Accordingly, on April 15, 2019, the Board held another status conference. At this status conference, UPW's counsel took the position that there should be an HOM on the same issues submitted to the Board for dismissal. Respondents' counsel submitted the Proposed Resolution and took the position that the remaining issues required determination after checking with UPW and DHRD. At the end of the status conference, the presiding Board Member J N. Musto stated that the Board would issue a notice of HOM dates and deadlines and review the dispositive motions.

Based on a review of the record, the Board concludes that the Order No. 2656 addressed and resolved most of the issues raised by the Amended Complaint, the Motion for Interlocutory Relief, and the Respondents' MTD/MSJ in this case. In addition, the five November 2009 HOMs and the November 19, 2009 oral ruling ordering the parties to bargain regarding the effects of the Kulani closure appears to have disposed of the failure to bargain issue.

Accordingly, the Board finds that the only unresolved issues in this case appear to be certain alleged CBA violations, such as employee discipline or leaves of absences, as noted in Order No. 2656. Based on the representations of counsel for the parties in this case, there is also the question of whether, and to what extent, these remaining unresolved issues are before Mediator Walter Ikeda. The Board takes the position that any issues already determined by the Board in Order No. 2656 or the November 19, 2009 oral ruling to bargain and any issues addressed in the November 2009 HOMs related to that oral ruling will not be relitigated in any future HOMs.

Therefore, for the purposes of clarification and efficiency of the hearing process, prior to setting new dates for the HOM and the deadlines, the Board requires and orders a Statement of Clarification of Remaining Issues and Information Regarding Case Status (Statement) from each of the parties. The Statement will include, but not be limited to the following:

- a. A substantive chronology of the proceedings and significant events in this case, with particular detail regarding the period following the issuance of Order No. 2656;
- b. A substantive chronology of the matters related to this case which were filed in the courts, including, but not limited to, the mediation before Walter Ikeda, and the potential impact of those matters on this case;

c. Whether this case can proceed at this time given the pending mediation before Walter Ikeda; and, if so, whether the full HOM can be completed while this mediation is pending;

d. The specific issues regarding the violations of the CBAs and any other issues that the party asserts remain unresolved by Order No. 2656 and the November 19, 2009 oral ruling; and whether further HOMs are necessary to receive the evidence required to be presented to resolve those issues;

e. If further HOMs are necessary, what evidence (witnesses and documents) is necessary to resolve the outstanding issues that has not already been submitted into the record;

f. Whether the grievance procedures in the Unit 1 and 10 CBAs were exhausted regarding the alleged unresolved CBA violations, such as the provisions regarding employee discipline or leaves of absences, in violation of HRS § 89-13(a)(8)? If so, please provide a substantive chronology for each grievance filed, status, and method of resolution of those grievances; and please attach the grievance step filing(s) and any document disposing of the grievance(s), such as arbitration decisions, settlement agreements, and/or withdrawal;

g. Whether the Proposed Resolution was signed by the Governor. If so, when and please provide an executed copy or other document showing approval of the Proposed Resolution by the Governor;

h. Whether, if the Proposed Resolution was not signed by the Governor, the Proposed Resolution nonetheless resolved the effects bargaining over the closing of Kulani. In stating your position, please provide a list of any affected employees listed in the Proposed Resolution and who were not offered or receive consideration in accordance with the Proposed Resolution; and

i. Any other information that the parties can provide affecting the scope or scheduling of an HOM in or the disposition of this matter.

The UPW is to file and serve upon Respondents its Statement by May 31, 2019. Upon receipt of UPW's Statement, the Respondents have 30 days to file their Statement in response.

DATED: Honolulu, Hawai'i, _____ April 30, 2019 _____.

HAWAI'I LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

N. MUSTO, Member

Copies sent to:

Herbert R. Takahashi, Esq.

Jeffrey Keating, Deputy Attorney General

Richard H. Thomason, Deputy Attorney General

ⁱ Ryker Wada, the current DHRD Director for the State of Hawai'i, is substituted for Laderta. However, for purposes of this discussion, the reference to Laderta will remain. Pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 25(d)(1), when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party; proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. The Board has applied the HRCP where its administrative rules are silent. Dep't of Public Safety, State of Hawai'i v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CU-10-322, Order No. 2944, at *2 n. 2 (2013).

ⁱⁱ David Y. Ige, the current Governor of the State of Hawai'i, is substituted for former Governor Lingle. However, for purposes of this discussion, the references to Lingle will remain. *See* endnote 1, *supra*.

ⁱⁱⁱ Nolan Espinda, the current PSD Director is substitute as a party for former PSD Director Clayton Frank. However, for purposes of this discussion, the references to Frank will remain. *See* endnote 1, *supra*.

UPW v. Wada, et al.

Case Nos. CE-01-720a, CE-10-720b

Order Requiring Parties to Submit Statement of Clarification of Remaining Issues and Provide Information Regarding Status of this Case

Order No. 3494